Supreme Court, U.S.
FILED
JAN 3 1997
CLERK

No. 96-800

In The

Supreme Court of the United States

October Term, 1996

KOTAM ELECTRONICS, INC.,

Petitioner,

v.

JBL CONSUMER PRODUCTS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STEPHEN E. NAGIN
HAL K. LITCHFORD
Counsel of Record
LITCHFORD, CHRISTOPHER, NAGIN & FIGUEREDO
3580 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2316
Telephone: (305) 374-6600
Facsimile: (305) 982-1599
Internet: sen@litchris.com

January 3, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CITATIONS AND OTHER AUTHORITIES

CASES:

Ainsworth v. Skurnick, 960 F.2d 939 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993) 4

American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2nd Cir. 1968) 5, 6

Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974).....5, 6

Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 5

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) 5

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 5

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 1, 4, 5

United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967) 5

OTHER AUTHORITIES:

9 U.S.C. 10, 11 4

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent's disingenuous discussion of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as its omission of any response to arguments raised either in the Petition or by the United States Department of Justice in its *amicus curiae* brief submitted to the Eleventh Circuit (*en banc*), necessitates this Reply.

The Eleventh Circuit decision (*en banc*), 93 F.3d 724 (1996) – which extends *Mitsubishi* to domestic antitrust cases – fails to distinguish between the *limited* effect of an absence of discovery and appellate review in the international context, and the *pronounced* effect of those missing components in the domestic context. The domestic legal arena is devoid of the overriding, countervailing considerations that supported this Court's explicit weighting of factors in the international context of *Mitsubishi*. Respondent simply ignores these significantly distinguishing features. Consequently, the reasoning in respondent's brief makes no sense for the domestic economy.

In international arbitration of antitrust matters, characterized by the lack of a written opinion with findings of fact and conclusions of law, and the absence of meaningful appellate review, the principle of *stare decisis* simply is not a concern. Consequently, where arbitral awards will not affect domestic antitrust enforcement it is appropriate to accommodate arbitration for antitrust disputes in an international context. This political and legal concession to international considerations (e.g., "concerns of international comity, respect for the capacities of foreign and

transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes," *Mitsubishi*, at 629) outweighs the possibility that idiosyncratic arbitral awards might be at odds with U.S. law.

Thus it is understood that, for U.S. businesses choosing to conduct international commerce, an arbitral dispute resolution forum will be honored, and not set aside by a U.S. court, devoid though that forum might be of normative features and protections set forth in the Federal Rules of Civil Procedure, Federal Rules of Evidence, and Federal Rules of Appellate Procedure. *Mitsubishi* establishes this proposition, and to read the case as anything other than an insightful recognition of the limitation of U.S. law, through a careful balance of international comity considerations, would render much of the basic reasoning of the decision superfluous and irrelevant.

Respondent, a major company that insisted on the arbitration clause at issue, apparently is unconcerned about the deleterious effects of expanding *Mitsubishi's* holding to the domestic context. However, the writ of certiorari should be issued because the very points that respondent chooses to ignore in its Opposition are central to domestic enforcement of antitrust law, as stressed by the United States.

Respondent conspicuously avoids even discussing the potential for a durable, deleterious effect caused by forestalling meritorious private (or governmental) suits and retarding development of legal precedent. The United States, in its *en banc* brief as *amicus curiae* in the

Eleventh Circuit, pointed out that routine use of arbitration clauses in an industry or by a single entity with market power may escape public notice, thereby forestalling meritorious suits and on-going development of legal precedent (U.S. *amicus* brief, below, at 16). Respondent ignores this concern because the *en banc* decision below cannot sustain scrutiny on this issue.

Consideration of just one of many possible hypothetical examples might assist the Court. Assume that "A" and "B" agree to arbitrate any disputes – including *intentional* torts, such as antitrust claims – although unbeknownst to "A" it has overpaid for goods purchased from "B" because "B," "C," and "D" are engaged in a price-fixing conspiracy. If "A" subsequently proceeds against "B," enforcement of the arbitral provision would deprive "A" of third party discovery essential to prevailing in its antitrust claim. Similarly, if the party imposing the arbitration clause in a contract of adhesion possesses market power such that the second party has no practical choice but to sign the contract as is, then presumably an antitrust dispute would be forced into arbitration unless the second party could show at the outset, that its adversary possessed market power in a relevant market sufficient to force adhesion to the contract in the first place – i.e., full scale, rule-of-reason proof would be required just to avoid an unjust requirement to arbitrate the dispute.

The limitations on discovery typical of arbitration proceedings are "unsuited" to many types of antitrust claims (U. S. *amicus* brief, below, at 17), inasmuch as proof of market power often is critical in such cases. This especially is a threshold factor if a supposedly "negotiated" agreement to arbitrate a domestic antitrust dispute

is challenged on the basis that effective "negotiation" never occurred due to that very existence of market power (which is exactly what was claimed below in the case at bar). The absence of discovery from third parties necessary to establish the circumstances which give rise to the exercise of overwhelming economic power effectively would deny availability of proof required both to escape the arbitration clause and to win the dispute, itself. Once again, respondent simply ignores this issue.

The potential for costly and inefficient concurrent arbitration and litigation, as well as "the possibility of inconsistent results" (U. S. *amicus* brief, below, at 18), also augur against extending *Mitsubishi* to the domestic context. Yet Respondent ignores these dangers, as well.

The reporter systems are replete with cases in which district and circuit courts are reversed because judges made mistakes (just as the Eleventh Circuit has in this instance). Antitrust is a complicated area of law, yet it is so important to consumer welfare that such judicial errors must be corrected. When federal trial and appellate judges, chosen by the President and confirmed by the Senate, make mistakes (as they do) that can affect the fabric of our economy, their written decisions may be corrected by higher authority. Arbitrators, whose backgrounds receive considerably less scrutiny, are no less likely to make mistakes than carefully appointed federal judges. However, because arbitral review is limited only to clearly irrational or arbitrary errors of law or interpretation (9 U.S.C. 10, 11; *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993)), the absence of judicial review (discussed in the U.S. *amicus* brief, below, at 18-19) is an even more powerful

basis to reject arbitration of domestic antitrust claims. Respondent also ignores this significant concern.

Respondent evidently does not share the United States' concern over the "absence of federal oversight" (U.S. *amicus* brief, below, at 19), and ignores the fact that this Court's decisions subsequent to *Mitsubishi*, which address arbitrability of other statutes, are distinguishable because the Court "had no cause to rule on the considerations specific to arbitrability of domestic antitrust disputes" (U.S. *amicus* brief, below, at 20).

Lastly, the reasons to preclude arbitration of domestic antitrust disputes – one decade after *Mitsubishi*, over two decades after *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974), and almost three decades after *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2nd Cir. 1968) – remain sound, even though this Court never has had occasion to consider those reasons. Perhaps this is why respondent distorts and overstates the decision in *Mitsubishi*, ignores the United States Department of Justice's concerns, avoids many of Petitioner's concerns, ignores the effect of its position on the jurisprudence of antitrust, and disingenuously treats the arbitrability of domestic antitrust claims as though this Court already has decided the issue.

When *American Safety* was decided in 1968, the application of economic reasoning to antitrust cases still was in its infancy. The level of reasoning by the Court has continued to evolve – from the Court's overruling of *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), to the Court's limitation of *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), in *Eastman*

Kodak Co. v. Image Technical Servs., Inc. 504 U.S. 451 (1992). When *Cobb* was decided, half a dozen years after *American Safety*, the Fifth Circuit did not consider more sophisticated rationale for the same reason that the *American Safety* court did not do so, and also, because it simply relied on the rationales expressed in *American Safety*. Consequently, for Respondent to suggest that this Court need not "consider an issue concerning which it has already provided sufficient guidance" – when the Court has *not* previously decided the issue, and the circuits that did so (and by virtue of which an inter-circuit conflict exists) did not have the benefit of many arguments never raised in the seminal cases of *American Safety* and *Cobb* – simply begs the issue.

CONCLUSION

For the foregoing reasons, respondent's opposition misses the mark, and the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN E. NAGIN
HAL K. LITCHFORD
Counsel of Record
LITCHFORD, CHRISTOPHER, NAGIN
& FIGUEREDO
3580 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2316
Telephone: (305) 374-6600
Facsimile: (305) 982-1599
Internet: sen@litchris.com

January 3, 1997